

STATE OF MICHIGAN
IN THE SUPREME COURT

In re:

The Honorable

BEVERLEY NETTLES-NICKERSON,

Judge, 30th Circuit Court.

Supreme Court No. 133929

JTC Formal Complaint No. 81

**AMICUS CURIAE BRIEF OF THE WOLVERINE BAR ASSOCIATION
IN SUPPORT OF HON. BEVERLEY NETTLES-NICKERSON
OPPOSING THE JUDICIAL TENURE COMMISSION'S
DECISION AND RECOMMENDATION FOR ORDER OF DISCIPLINE**

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INTEREST OF AMICUS CURIAE

The Wolverine Bar Association (WBA) was established during the 1930's. It was originally organized to coordinate the energies and talents of the increasing number of African-Americans admitted to practice throughout Michigan. While the diversity of its members has expanded, the goals and ideals of equality and dedication to the community have not significantly changed from those of its founders nearly 75 years ago. With over sixty association members in judicial positions on the State and Federal bench and over 800 practicing attorneys statewide, the Wolverine Bar Association recognizes an obligation to assist this Court on important issues of law that would substantially affect the orderly administration of justice in this state. This case presents one such issue.

BASIS FOR AMICUS CURIAE BRIEF

Amicus Curiae submits this brief under the Court's May 16, 2008 telephonic order granting the Wolverine Bar Association' May 15, 2008 motion to file Amicus Curiae brief.

QUESTIONS PRESENTED

- I. IS THE JUDICIAL TENURE COMMISSION'S UNPRECEDENTED RECOMMENDATION TO BOTH REMOVE AND CONDITIONALLY SUSPEND RESPONDENT VIOLATIVE OF CONST. 1963, ART. 6, § 30 AND CONST. 1963, ART. 6, § 4?

Amicus answers: Yes.

- II. SHOULD THE PORTION OF THE \$128,861.26 IN COSTS THAT ARE ASSOCIATED WITH THE PAYMENT OF PRIVATE COUNSEL BE SET ASIDE WHEN THE HIRING OF OUTSIDE COUNSEL BY THE JUDICIAL TENURE COMMISSION VIOLATED RESPONDENT'S RIGHTS OF DISCLOSURE AND CONFIDENTIALITY?

Amicus answers: Yes.

BACKGROUND FACTS

On or about May 16, 2007, the Judicial Tenure Commission (JTC) filed a ten-count complaint against Hon. Beverley Nettles-Nickerson ("Respondent"). Count I alleged that Respondent made a fraudulent claim of residency to obtain a divorce. Count II alleged that Respondent made false statements, solicited false statements by others, and/or fabricated evidence. Count III alleged that Respondent coerced court employees into listing cases on the no progress docket. Count IV alleged that Respondent was responsible for excessive absences, belated commencement of proceedings, untimely adjournments and improper docket management. Count V alleged that Respondent engaged in improper *ex parte* communications. Count VI alleged that Respondent allowed social or other relationships influence the release of a criminal defendant from probation. Count VII alleged that Respondent attempted to retaliate against the probation department and certain employees. Count VIII alleged that Respondent improperly terminated her judicial assistant and covered up the reasons for the dismissal. Count IX alleged that Respondent engaged in judicial misconduct associated with a dispute between herself and the owner of a gasoline filling station. Finally, Count X alleged that Respondent made unsubstantiated claims of racism. After a hearing, Honorable Leopold Borrello as Master issued a thirty-five page report on February 12, 2008. The JTC adopted and incorporated the Master's conclusions of law with respect to Counts I – IV, VI and IX of the Formal Complaint. In addition, the JTC recommended the additional sanction of a six-year conditional suspension (commencing on January 1, 2009), without pay and the assessment of costs totaling \$128,861.26. The JTC filed its Decision of and Recommendation for Order of Discipline with this Court. This Court on April 28, 2008, issued a briefing order and set this matter for oral argument on June 11, 2008.

LEGAL ARGUMENT

I. IS THE JUDICIAL TENURE COMMISSION'S UNPRECEDENTED RECOMMENDATION TO BOTH REMOVE AND CONDITIONALLY SUSPEND RESPONDENT VIOLATIVE OF CONST. 1963, ART. 6, § 30 AND CONST. 1963, ART. 6, § 4?

Standard of Review

This Court reviews the record de novo. *In re Noecker*, 472 Mich 1; 691 NW2d 440 (2005). Both the factual findings and disciplinary recommendations of the JTC are reviewed de novo. *In re Haley*, 476 Mich. 180; 720 NW2d 246 (2006). In reviewing the record de novo, this Court considers whether the conduct charged and found by the JTC is established by the record, whether the conduct is of a nature warranting discipline, and whether the discipline recommended by the commission or some other form of discipline should be imposed. *In re Moore*, 464 Mich. 98, 626 NW2d 374 (2001). The standard of proof is by a preponderance of the evidence. *In re Ferrara*, 458 Mich 350; 582 NW2d 817 (1998).

This Court's authority to discipline members of the state judiciary flows from two sources, §§ 30 and 4 of Article 6 of the Michigan Constitution. *Matter of Probert*, 411 Mich 210, 229; 308 NW2d 773 (1981). Const. 1963, art. 6, § 30 provides:

(2) On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire **or** remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice. The supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings.

Const. 1963, art. 6, § 4 provides:

The supreme court shall have general superintending control over all courts; power to issue, hear and determine prerogative and remedial writs; and appellate jurisdiction as provided by rules of the supreme court. The supreme court shall not have the power to remove a judge.

When interpreting constitutional provisions, Michigan courts are guided by two fundamental precepts. First, under the rule of common understanding, this Court interprets constitution provisions to have the meaning most obvious to the reasonable person. See *Traverse City Sch Dist v Attorney General* 384 Mich 390, 405 185 N.W.2d 9 (1971). Second, “because fundamental constitutional principles are of equal dignity, none must be so construed as to nullify or substantially impair another.” *Probert*, *supra* citing *People v Blachura*, 390 Mich 326, 333; 212 NW2d 182 (1973).

This Court's general superintending control of all Michigan courts is a broad grant of constitutional authority to take necessary action, short of the outright removal of a judge. *In re Hathaway*, *supra* at 684. At issue in this case, is whether the JTC or this Court has jurisdictional authority to impose **conditional** sanctions **after** a judicial officer is removed from office. As recognized by this Court in *Probert*-- “[e]ven in the case of the most extreme civil sanction that can be inflicted upon a judge impeachment the penalty “**shall not extend further than removal from office**”. *Probert*, *supra* at 233 n 18, citing Const.1963, art. 11, § 7. .

The issue of whether Const. 1963, art. 6, § 30 authorizes sanctions against non-judicial officers was raised in the dissenting opinion of Justice Levin:

[T]he power to recommend discipline and to enter a final order of discipline is defeated because s 30 authorizes the recommendation and imposition of discipline for **incumbent** judges only. Since the commission has no power to recommend discipline and the Court has no power to order discipline under s 30, neither the commission nor the Court has power to continue to address the merits of the disciplinary proceeding. It is the lack of power to recommend and to order discipline under s 30 which defeats jurisdiction under s 30.

Id. at 245 (emphasis added).

Here, should this Court remove Respondent from office, she is divested from office and is no longer a judicial officer. The JTC's authority to recommend and impose an additional conditional sanction ceases under Const. 1963, art. 6, § 30. This case presents the ominous scenario predicted by

Justice Levin, at 252-253, that the JTC would engage in post-disciplinary proceeding sanctions against judicial officers:

If the commission has the power to continue proceedings against one who is no longer a judge, it is difficult to discern a reason why it might not initiate proceedings against one who is not a judge for misconduct in office which has only come to light since the judge has left office. The commission then would have the power to require any retired or defeated judge, without regard to whether a complaint had been filed before he left office, to defend against charges of misconduct notwithstanding that these ex-judges may never intend or have the opportunity to hold judicial office in the future.

If the power asserted by the Judicial Tenure Commission in the instant case is recognized, the commission might feel obliged, as it apparently did in this case, to implement what the members of the commission who dissented from the majority's recommendation characterized as "a policy of pursuit into retirement."

II. SHOULD THE PORTION OF THE \$128,861.26 IN COSTS THAT ARE ASSOCIATED WITH THE PAYMENT OF PRIVATE COUNSEL BE SET ASIDE WHEN THE HIRING OF OUTSIDE COUNSEL BY THE JUDICIAL TENURE COMMISSION VIOLATED RESPONDENT'S RIGHTS OF DISCLOSURE AND CONFIDENTIALITY?

Under Const. 1963, art. 6, § 30, "[t]he supreme court shall make rules implementing this section and providing for confidentiality and privilege of proceedings." The confidentiality of proceedings has traditionally been respected by the JTC as it has a full-time staff of attorneys who have historically prosecuted formal complaints filed by the Commission. Yet, the confidentiality of the instant proceedings has been threatened with the retention of private and non-State attorneys.

JTC post-complaint confidentiality restrictions are governed by MCR 9.216(D), which provides in relevant part:

(1) When the commission issues a complaint, the following shall not be confidential or privileged:

(a) the complaint and all subsequent pleadings filed with the commission or master, all stipulations entered, all findings of fact made by the master or commission, and all reports of the master or commission; however, all papers filed with and proceedings before the commission during the period preceding the issuance of a complaint remain confidential and privileged except where offered into evidence in a formal hearing; and

(b) the formal hearing before the master or commission, and the public hearing provided for in MCR 9.216.

Whom the JTC may employ is governed by MCR 9.202(G) and provides in relevant part:

(1) The commission shall employ an executive director or equivalent person or persons, and such other **staff members** as the commission concludes are warranted, to perform the duties that the commission directs, **subject to the availability of funds under its budget.**

(Emphasis added).

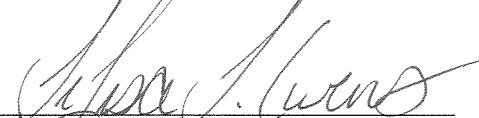
Here, the retention of outside counsel in violative of MCR 9.202(G) and akin to the hiring of a “special prosecutor” an act, heretofore, unprecedented in this State. MCR 9.202 contemplates that staff members shall conduct the affairs of the Commission—as has always been the case in Michigan judicial disciplinary proceedings. The potentially chilling effect of JTC’s unilateral decision to hire outside counsel would force judicial officers to abandon any potential defense if faced with the paying the costs of the JTC’s counsel in addition to their own defense costs.

CONCLUSION AND REQUEST FOR RELIEF

For all the reasons stated herein, Amicus respectfully requests that this Court reject the JTC’s recommended sanction and assessment of costs.

Respectfully submitted,

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